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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 138

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, AND DE SYLVA, BROWN & HENDERSON, INC., A CORPORATION,

vs.

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION

No. 139

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, AND LEO FEIST, INC., A CORPORATION,

vs.

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION

No. 140

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ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED MAY 22, 1930

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UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, 1930

No. 8680

NE BUCK, as President of the American Society of Composers, Authors and Publishers, and De Sylva, Brown & Henderson, Inc., a Corporation, Appellants,

vs.

JEWELL-LA SALLE REALTY COMPANY, a Corporation, Appellee

No. 8681

NE BUCK, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a Corporation, Appellants,

vs.

JEWELL-LA SALLE REALTY COMPANY, a Corporation, Appellee

No. 8689

JEWELL-LA SALLE REALTY COMPANY, a Corporation, Appellant,

vs.

NE BUCK, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a Corporation, Appellee

peals from the District Court of the United States for the Western District of Missouri

Mr. Thomas G. Haight (Mr. Maurice J. O'Sullivan, Mr. han Burkan, Mr. E. S. Hartman, and Mr. Louis D. hlich were on the brief) for Gene Buck, as President, , et al.

Mr. Charles M. Blackmar and Mr. Kenneth E. Midgley (Messrs. Meservey, Michaels, Blackmar, Newkirk & Eager were on the brief) for Jewell-La Salle Realty Company.

Before Booth and Gardner, Circuit Judges, and Sanborn, District Judge

[fol. 2] The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that records on appeals Nos. 8680, 8681, and 8689 having been submitted together and now pending before it, disclose the following:

Statement of Facts

Appeal No. 8680

In Appeal No. 8680 suit was brought in the United States District Court for the Western District of Missouri by Gene Buck, as President of the American Society of Composers, Authors and Publishers, and De Sylva, Brown & Henderson, Inc., a corporation, Plaintiffs, vs. Wilson Duncan, operating Radio Station KWKC, and Jewell-La Salle Realty Company, a corporation, Defendants, for an injunction and damages for infringement of the copyright of a musical production. It was stipulated by the parties that the facts stated in the bill of complaint were true; and certain additional facts were also stipulated. From the bill and the stipulation the following facts have been gathered:

[fol. 3] I. The American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"), is an unincorporated association organized and existing under and by virtue of the laws of the State of New York and has its principal place of business in the Southern District of New York. The membership of the Society exceeds 700, and is comprised of authors, composers and publishers of musical works. Said Society was organized and is now operating for the purpose of protecting the performing rights in musical works, copyrighted by its members respectively, against infringement because of the public performance thereof for profit.

Gene Buck is president of said Society. Because said membership is exceedingly numerous and it would be im-

practicable to join all the members of said Society as parties plaintiff, and the issues and questions involved here are of common and general interest to all of the members of the Society, the said Society has duly authorized and empowered the said Gene Buck as president thereof to institute and prosecute this suit in its behalf; and this suit is accordingly brought by plaintiff Gene Buck as president of The American Society of Composers, Authors and Publishers, for and on behalf of said Society.

II. The plaintiff De Sylva, Brown & Henderson, Inc. (hereinafter for brevity's sake called the "Publisher"), is a corporation organized under the laws of the State of New York, having its principal place of business in the Southern District of New York, and at all times hereinafter mentioned, was engaged in the business of printing, publishing and vending of copyrighted musical works.

III. The defendant Wilson Duncan is an individual and a resident of the Western District of Missouri; and defendant Jewell-La Salle Realty Company is a corporation organized and existing according to law, having an office and [fol. 4] its chief place of busines in the Western District of Missouri.

IV. At all of the times herein mentioned, defendant Jewell-La Salle Realty Company (hereinafter for convenience called the "Company"), owned and operated a certain hotel in Kansas City, Missouri, known as the La Salle Hotel, for the entertainment of its guests and the public generally. Said guests were guests for hire, and said hotel was operated as a commercial enterprise for profit. For the entertainment of the guests in said hotel, and of the public generally, and to promote the business of the Company, and to make said hotel an attractive and desirable place, and to attract trade and custom thereto, and in order that renditions of musical compos-tions might be heard in the hotel daily by the guests, the Company, among other instruments and devices, caused to be installed and maintains in said hotel a master radio receiving set, which receives and converts radio waves transmitted from radio broadcasting stations into sound. Said receiving set was equipped with wires leading therefrom to all parts of the

hotel, including the public rooms, parlors, and lobby, as well as into about two hundred private rooms. Loud speakers were attached to the wires leading from the receiving set, so that any musical composition picked up by said receiver could be and is simultaneously heard throughout the hotel.

V. At all of the times herein mentioned, defendant Wilson Duncan was the owner of and operated a certain radio station in Kansas City, Missouri, known and designated as KWKC. Said defendant was licensed by the Government of the United States to operate such radio station as a commercial station. Such license was issued to said defendant on an application filed by him with the department having jurisdiction, stating that said radio station was operated [fol. 5] and was to be operated for business and commercial purposes. Said defendant operated the station for profit and for hire, and received rent and income therefrom from persons engaging the facilities of the station, who desired their names or business to be mentioned over it, so that the same might be heard by the general public for the purpose of advertising such names or business. As a part of the business of said defendant and to make the station profitable to said defendant, and to attract others to engage the facilities of the station and pay therefor, said defendant caused musical compositions to be performed and rendered in and broadcast from the radio station. Such renditions and performances were public and were made available to the public, and were for the purposes of profit, both for said defendant and for others using the station or procuring their names or business to be mentioned over it.

VI. Prior to the 15th day of August, 1927, B. G. De Sylva, Lew Brown and Ray Henderson, citizens of the United States, created and wrote the words and lyrics of a new and original musical composition; and also prior to that date they composed and set original music to the words and lyrics, constituting a musical composition entitled, "Just Imagine."

VII. Prior to the 15th day of August, 1927, the authors and composers assigned such composition to the Publisher, including all rights therein and the right to secure copyright therein.

VIII. On the 15th day of August, 1927, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright 1927 by De Sylva, Brown and Henderson, Inc."

IX. After publication of such composition with such notices of copyright, the Publisher promptly on the 16th day of August, 1927, deposited in the office of the Register [fol. 6] of Copyrights, Washington, D. C., two complete copies of the best edition thereof then published, accompanied by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work; and said work was duly registered by the said Register of Copyrights, who thereupon issued his certificate of copyright registration therefor as Class E, XXc., No. 670767.

X. Since August 15, 1927, such composition has been published by the Publisher; and upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth in paragraph VIII hereof.

XI. Prior to the 1st day of January, 1926, the Publisher, for a valuable consideration, by an instrument in writing, duly assigned, transferred, and set over to the Society the exclusive non-dramatic performing rights in and to any and all musical compositions, the copyright of which was then owned by the Publisher, for the term commencing January 1, 1926, and ending January 1, 1931, as well as the exclusive non-dramatic performing rights in and to any and all musical compositions to be thereafter acquired and copyrighted by the Publisher for such term.

XII. The Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph VI hereof, and all the rights secured under such copyright, except as to the rights assigned to the Society as set forth in paragraph XI. The Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in paragraph XI hereof, up to and including the 1st day of January, 1931, and by virtue of such assign-

ment the Publisher holds in trust for the Society the exclusive non-dramatic performing rights of said musical com-
[fol. 7] position secured by said copyright down to and including the 1st day of January, 1931.

XIII. Said composition has been used in connection with the manufacture of parts of instruments serving to reproduce mechanically said musical work, and the Publisher has filed a notice thereof, accompanied by the proper recording fee, in the office of the Register of Copyrights, and said notice is on file and is recorded therein, and the recording fee therefor has been paid to the Register of Copyrights.

XIV. On the 4th day of October and on the 7th day of October, 1928, and at other times prior and subsequent thereto, without the previous knowledge or consent of the Society or of the Publisher, and without subsequent ratification or consent of either the Society or the Publisher, and with full knowledge of said Society's rights in such work and of such copyright belonging to the Publisher, the defendant Duncan by means of his radio broadcasting station, gave and caused to be given public performances and renditions for profit of said musical composition; and the defendant Realty Company by means of its radio receiving set and other devices owned and controlled by it, enabled and caused its guests in the La Salle Hotel to hear said musical production so performed and rendered by said defendant Duncan by means of his radio broadcasting station.

XV. No pre-arrangement existed between the defendant Duncan and the defendant Company with respect to what music should be broadcasted by Duncan or received by the Company other than what might be said to be the usual pre-arrangement between any broadcaster and any person commercially operating a receiving set. The defendant Duncan operated his radio broadcasting station without any connection whatsoever with the Company. He selected his own
[fol. 8] programs and broadcasted them for the benefit of himself and whoever chose to tune in and receive them.

XVI. On May 29, 1928, there was addressed to said defendant Company by registered mail a letter, advising it generally of the terms of the Copyright Act. Enclosed therewith was a list of the members of the American Society of Composers, Authors, and Publishers. The name of the

plaintiff De Sylva, Brown & Henderson, Inc., was included in said list of members. Defendant Company was informed that unless and until license was obtained from said American Society it should strictly avoid the rendition or performance in its hotel of any musical compositions copyrighted by any member of said Society, under any circumstances.

An order pro confesso for failure to answer was entered against the defendant Duncan; later, a final decree was entered granting an injunction and damages against him, and dismissing the bill as to defendant Jewell-La Salle Realty Company for lack of equity.

The contention of appellant is that the Jewell-La Salle Realty Company, through the use of its receiving set and loud speakers on the dates above mentioned gave a public performance for profit of the musical composition in question within the meaning of 17 USC Sec. 1 (e).

The contentions of the appellee are (a) that the Jewell-La Salle Realty Company was not a performer within the meaning of the statute cited; (b) that the alleged performance in the hotel was not "for profit" within the meaning of those words as used in the statute.

Question Certified

This court, being in doubt, desires the instruction of the Supreme Court upon the following question, a decision of which is deemed indispensable to a determination of appeal No. 8680 now before it, and to a proper discharge [fol. 9] of its duties therein:

Question I. Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1 (e)?

Wilbur C. Booth, United States Circuit Judge. Archibald K. Gardner, United States Circuit Judge. John B. Sanborn, United States District Judge.

[fol. 10] STATEMENT OF FACTS

Appeals Nos. 8681 and 8689

These appeals grow out of one suit which involved in its first count a state of facts similar to those in No. 8680, except that the hotel company alone was made defendant. The seventh count differed from the first count in this: that the infringement alleged was that the hotel company by means of an orchestra caused the production in the hotel of a musical composition protected by a copyright,—the rights under which were owned by plaintiffs,—no consent to such production having been obtained by defendant. There was no proof of actual damages. The decree dismissed the first count for lack of equity; but awarded damages to plaintiff on the seventh count in the sum of $250.

The plaintiffs have appealed (No. 8681) from that part of the decree which dismissed the first count. The defendant has appealed (No. 8689) from that part of the decree which awarded damages on the seventh count.

The contentions of the parties in appeal No. 8681 are the same as in appeal No. 8680.

The contention of the appellant in appeal No. 8689 is that the court adopted the wrong statutory measure of damages; that instead of adopting the amount in the "no other case" clause of Section 25(b) of the Act of March 4, 1909 (35 Stat. 1081, Chap. 320) as amended (37 Stat. 489) [17 U. S. C. Sec. 25], it should have adopted the amount fixed by Section 25(b) Fourth.

QUESTIONS CERTIFIED

This court, being in doubt, desires the instruction of the Supreme Court upon the following questions, a decision of which is deemed indispensable to a determination of the appeals in Nos. 8681 and 8689 now before it, and to a proper discharge of its duties therein:

Question I. Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel [fol. 11] and under his control and for the entertainment

of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such musical composition within the meaning of 17 U. S. C. Sec. 1(e)?

Question II. In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of $250 set out in the so-called "no other case" clause of Section 25(b) of the Copyright Act (17 U. S. C. Sec. 25), reading, "and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty?"

Question III. Is Section 25(*b*) Fourth of the Copyright Act (17 U. S. C. Sec. 25) applicable, in the discretion of the court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?

Question IV. In Section 25(b) of the Copyright Act (17 U. S. C. Sec. 25) is the clause reading, "nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant," confined in its scope to the particular cases of infringement theretofore specifically mentioned in said Section 25(b)?

Wilbur C. Booth, United States Circuit Judge. Archibald K. Gardner, United States Circuit Judge. John B. Sanborn, United States District Judge.

[fol. 12] Clerk's certificate to foregoing certificates omitted in printing.

[Endorsed:] U. S. Court of Appeals, Eighth Circuit. No. 8680. Gene Buck et al., vs. Appellants, Jewell-La Salle Realty Co. No. 8681. Gene Buck et al., vs. Appellants, Jewell-La Salle Realty Co. No. 8689. Jewell-La Salle Realty Co., vs. Appellant, Gene Buck et al. Certificates of questions to Supreme Court U. S.

Endorsed on cover: File No. 35,052, 35,053, 35,054. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 921. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and De Sylva, Brown & Henderson, Inc., a corporation, vs. Jewell-La Salle Realty Company, a corporation. (Certificate). Term No. 922. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a corporation, vs. Jewell-La Salle Realty Company, a corporation. Term No. 923. Jewell-La Salle Realty Company, a corporation, vs. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a corporation. Filed May 22, 1930. File. No. 35,052, 35,053, 35,054.

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No. 140.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

JEWELL-LaSALLE REALTY COMPANY, A CORPORATION,

VS.

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, AND LEO FEIST, INC., A CORPORATION.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR JEWELL-LaSALLE REALTY COMPANY (DEFENDANT BELOW) ON QUESTIONS II, III AND IV.

CHARLES M. BLACKMAR,
KENNETH E. MIDGLEY,
Attorneys for Jewell-LaSalle Realty Company.

MESERVEY, MICHAELS, BLACKMAR, NEWKIRK & EAGER,
Of Counsel.

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No. 140.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

JEWELL-LaSALLE REALTY COMPANY, A CORPORATION,

VS.

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, AND LEO FEIST, INC., A CORPORATION.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR JEWELL-LaSALLE REALTY COMPANY (DEFENDANT BELOW) ON QUESTIONS II, III AND IV.

DISTRICT COURT OPINION.

The opinion of the District Court in this case which is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and out of which the questions certified herein arise, is officially reported in 32 Fed. (2d) 366 under title of *Buck* v. *Duncan*. The portion of the opinion covering questions II, III and IV in the certificate is found at loc. cit. 368.

JURISDICTIONAL GROUNDS.

This court has jurisdiction by virtue of the Certificates of the United States Circuit Court of Appeals for the Eighth Circuit under 28 U. S. Code, Section 346, the questions arising in a case now pending before it and on which it desires the instruction of this court.

STATEMENT OF FACTS.

This case is before the court on certificate from the Eighth Circuit Court of Appeals. Questions II, III and IV in the certificate (R. 9) relate to the matters in the cross appeal of defendant Jewell-LaSalle Realty Company (hereinafter called the Company) from the judgment of the United States District Court for the Western Division of the Western District of Missouri (32 Fed. (2d) 366), and concern the question of the statutory measure of damages (17 U. S. Code, Sec. 25) for infringement of copyright in a non-dramatic musical composition by unauthorized public performance. The parties have agreed to file separate briefs on question I (which relates solely to plaintiffs' appeals in both cases) and on questions II, III and IV (which relate only to defendant's appeal in one of the cases). In this brief we will consider only the last three questions in the certificate.

The Company, by means of an orchestra, caused the performance of a copyrighted musical composition in its hotel—the rights under which were owned by

plaintiffs—without the consent of plaintiffs. There was no proof of actual damages (R. 8). The District Court, on the count charging this infringement, awarded plaintiffs $100 attorneys' fees and $250 damages, and enjoined defendant from further infringing plaintiffs' rights (32 Fed. (2d) 368). The Company filed its cross appeal to the Circuit Court of Appeals complaining that $250 was not the proper statutory measure of damages for the type of infringement involved herein where no actual damage was shown. The Circuit Court of Appeals has certified to this court the following questions:

> Question II. In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of $250 set out in the so-called "no other case" clause of Section 25 (b) of the Copyright Act (17 U. S. C. Sec. 25), reading, "and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty"?
>
> Question III. Is Section 25 (b) Fourth of the Copyright Act (17 U. S. C. Sec. 25) applicable, in the discretion of the court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?
>
> Question IV. In Section 25 (b) of the Copyright Act (17 U. S. C. Sec. 25) is the clause reading, "nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant," confined in its scope to the particular cases of infringement theretofore specifically mentioned in said Section 25 (b)?

PRELIMINARY STATEMENT.

Considerable confusion will be eliminated if at the outset, in searching the statute for a measure of damages to be applied to the case at bar, the character of the infringement admitted is particularly noted. Though the questions certified refer only to "infringement of a copyright covering a musical composition" (Ques. II, R. 9) without specifying the character of the infringement, the questions can only be answered in light of the statement of facts in the certificate, showing the infringment in question to be by *public performance for profit.* A "copyright covering a musical composition" may be infringed in various ways: by printing, reprinting, publishing, copying, vending (17 U. S. C. Sec. 1 (a)); by arranging or adapting (Sec. 1 (b)); by performing publicly for profit (Sec. 1 (d)); and so on. The term "damages" necessarily imports the idea of compensation; and the measure of damages for performing would not have any relation to the measure of damages for copying, as the wrongful act, or trespass, being of a different nature, the resulting injury would differ. It would therefore be logical to expect different measures of damages in the statute for different types of infringement. It follows that in some types of infringement of a musical composition copyright the court may be bound by the limitations of the "no other case" clause, whereas in other types of infringement is might not be. The questions, read in light

of the statement of facts, relate to infringement by performance. The question whether, in such a case, where no damage is shown, the court is bound to award $250 damages, has never been passed on by this court.

SUMMARY OF ARGUMENT.

Section 25 of the Copyright Statute is expressly recognized by the courts to be ambiguous and inartificially drawn, and to be burdensome and unreasonable when the limitations in the "no other case" clause are applied to cases of infringement of a musical composition copyright by public performance.

It is clear that the lower courts have unwillingly adopted such an unjust construction only because of the (we say, mistaken) conclusion that this court's decision in *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100, involving infringement of a copyright in an illustration by publication is controlling in cases of infringement of musical composition copyrights by public performance.

The Westermann case is not an authority for the proposition for which it has been cited, and does not, as has been generally supposed, require the court to assess $250 as a minimum in a case of infringement by public performance of a copyrighted musical composition.

Reference to previous Copyright Statutes and to the Congressional Committee reports is convincing that the legislature did not intend that subparagraph "fourth" relating to infringing performances should be limited by the "no other case" clause.

The Westermann case cannot be applied to infringement of a musical composition copyright by public performance because if so applied the statute becomes inconsistent with itself.

BRIEF OF ARGUMENT.

1.

Section 25 of the Copyright Statute is expressly recognized by the courts to be ambiguous and inartificially drawn, and to be burdensome and unreasonable when applied to cases of infringement of a musical composition copyright by public performance.

By questions II, III and IV in the Certificate, the Circuit Court of Appeals seeks the ruling of this court as to what measure of damages Section 25 of the Copyright Act (17 U. S. C. Sec. 25) provides "in lieu of actual damages" for an "infringing performance" of a non-dramatic musical composition. The statute is as follows:

> "Sec. 25. (*Infringements.*) That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> "(a) To an injunction restraining such infringement;
>
> "(b) To pay the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photo-

graph such damages shall not exceed the sum of two hundred dollars, nor be less than the sum of fifty dollars, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

"First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Second. In the case of any work enumerated in section five of this act, except a painting, statute or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

"Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

As to the type of infringement in question (public performance for profit) it must be conceded that the statute is ambiguous. It sets stipulated amounts for certain types of infringement (paragraphs "first" to "fourth"); yet in paragraph (b) the statute provides that for a newspaper reproduction of a copyrighted photograph the damages must be between $50 and $200, etc., and "in no *other* case" shall the damages range outside of a stipulated minimum or maximum. Does the word "other" refer to infringement by newspaper reproduction or motion picture production? Or does it refer to the four sub-paragraphs? Or does it refer to all types of infringement for which the statute does not stipulate a measure of damages, the phrase being intended as a catch-all to make sure no infringer will escape liability because an express measure of damages is not provided.

"I confess that, on the first reading of this statute I was firmly of the opinion that $10.00, being the sum specifically mentioned in clause 'fourth' of the section cited as recoverable for such infringement, should be the amount allowed as liquidated damages, in the absence of proof of actual damage." Bledsoe, D. J., in *Waterson, Berlin & Snyder* v. *Tollefson*, 253 Fed. 859.

"From a casual reading of this section, it would seem that the case of a musical composition being specifically provided for in the fourth paragraph, the case would be governed by that paragraph, which provides $10.00 for each performance, and that resort could not be had to the general clause in subdivision (b) providing $250.00 as the minimum, and at first I was very firmly of opinion that this was the proper construction." Cochrane, D. J., in *Whitmark & Sons v. Pastime Amusement Co.*, 298 Fed. 470.

"It was urged in that case, as in this that the fourth paragraph of the act providing the penalty applied and that $10.00 rather than $250.00 should in discretion of the court be fixed as the amount of recovery, and Judge Cochrane in that case thought, as I thought in this case when the statute was first read, that this was the correct interpretation." Groner, D. J., in *Buck* v. *Jarvis*, E. D. Va., decided March 23, 1927.

"I agree with the conclusion of the majority in all respects except as to the measure of damages to be awarded for infringement by us of a phonograph record for a public performance for profit. The question is not free from doubt, as the statute, with relation to the measure of damages, is decidedly ambiguous." Foster, C. J., dissenting in *Irving Berlin, Inc.* v. *Daigle*, (5th C. C. A.) 31 Fed. (2d) 832.

"* * * a statute which has been somewhat aptly described as 'inartificially drawn.'" *Dreamland Ballroom* v. *Shapiro, Bernstein & Co.*, (7th C. C. A.) 36 Fed. (2d) 354, l. c. 355.

To interpret the statute as it has been interpreted by the Honorable District Court effects results that are unconscionable and shocking to the sense of justice. The damages provided in these sections are "in lieu of actual damages" and are to be "such damages

as to the court shall appear to be just," and "shall not be regarded as a penalty." Under the interpretation of the statute now prevailing in the lower courts, a small town theatre owner has been compelled to pay perhaps his month's earnings because his hired boy pumping the player piano played on one occasion only a roll he had borrowed without the knowledge or consent of the proprietor (22 Fed. (2nd) 412). A cafe owner in a small town who also operated a music store in conjunction with the cafe, has been compelled to pay over three hundred and fifty dollars as damages, attorneys' fees and costs for playing a phonograph record while a few people were patronizing his restaurant (*Buck* v. *Myers*, W. D. Mo., not officially reported). The proprietor of a dance pavilion has been held liable for $750.00, costs and attorneys' fees because the orchestra he hired played three copyrighted selections —probably one-tenth of the music furnished for the evening—an amount surely far in excess of the gross proceeds of the dance (31 Fed. (2d) 832). A single Victrola performance in a cafe (24 Fed. (2d) 876), a single player piano rendition in a theater (24 Fed. (2d) 877), the playing of a single phrase of one chorus by "ear" by a theater organist (298 Fed. 470), have all been held to require the payment of $250.00, costs and attorneys' fees. If the statute must be so interpreted, then Congress, by legislative enactment, has required the courts to extract unconscionable penalties in favor of private parties, and then satirically to inform the defendant that he is not being punished—"shall not be regarded as a penalty."

The language of Judge Sanborn in *No. Pac. Ry. Co.* v. *U. S.* (8th C. C. A.) 213 Fed. 162, l. c. 167 in a case involving the construction of another statute, could well apply to the case at bar;

> "Such an interpretation of this Act of Congress renders it so unjust and oppressive that we cannot think that Congress intended that it should receive such a construction."

To similar effect is the language of this court in the appeal of the same case (*U. S.* v. *No. Pac. Ry. Co.*, 242 U. S. 190, l. c. 194):

> "We cannot bring ourselves to think that Congress intended to punish such an innocent mistake or omission with a penalty of $100 a day."

The judges assessing these so-called "damages" have realized their severity.

> "The plaintiff may, of course, take the usual injunction, though under the circumstances it will apparently be of no service. As for damages, it seems to be absurd to suggest that it has suffered any injury. 'Dardanella' had faded out before 'Kalua' appeared; but if it had been at the peak of its popularity, I do not believe that the accompaniment to the chorus of 'Kalua' would have subtracted one copy or one record from its sales. * * * I must and do award that sum ($250.00) as damages. The plaintiff is likewise absolutely entitled to a full bill of costs, but I will make no allowance for counsel fees, since that is discretionary. Such victories I may properly enough make a luxury to the winner" (Learned Hand, D. J., in *Fisher* v. *Dillingham*, 298 Fed. 145).
>
> "* * * The court feels that the statutory damage of $250.00 for each infringement is rather large" (Hicks, D. J., in *Cravens* v. *The Association*, 26 Fed. (2) 833).

"To adopt the rule that a minimum award of $250.00 must be granted in each case of infringement by use of a phonograph record in a moving picture show, or a small cheap restaurant, or a bootblack stand, in all of which they are frequently used, causes the resulting damages to be so excessive as to be unconscionable, an intention I cannot attribute to Congress" (Foster, C. J., dissenting in *Irving Berlin, Inc.* v. *Daigle,* 31 Fed. (2d) 832).

"* * * Without regard to my own views as to its hardship, I am obliged to enter decree * * * for $250.00 for playing of the selection in a dance hall" (*Buck* v. *Jarvis,* D. C. E. D. Va., Groner, D. J., opinion filed March 23, 1927).

"Appellants' argument in support of their position respecting the amount of damages, too, has much appeal." *Dreamland Ballroom* v. *Shapiro, Bernstein & Co., supra.*

It is not necessary unduly to lengthen this brief by similar quotations. The fact is clear that the statute is ambiguous and that the courts are awarding $250.00 minimum against their own expressed views as to the justice of such an award.

2.

It is clear that the lower courts have unwillingly adopted such an unjust construction only because of the (we say, mistaken) conclusion that this court's decision in Westermann Co. v. Dispatch Company, 249 U. S. 100, involving infringement of copyright in pictorial illustrations by publication is controlling in cases of infringement of musical composition copyrights by public performance.

An examination of the cases is convincing that the only reason for adopting such an unnatural and unreasonable construction has been the (we say, mistaken) assumption that the decision rendered by this court in

the case of *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100 (233 Fed. 609, in the Court of Appeals) is controlling not only in cases involving the type of infringement there under consideration, but also is controlling in cases of infringement by public performance of musical compositions. We insist that the Westermann case is not only not authority for the proposition for which it has been cited, but that if the decision is given full force in all three of its points of decision, it *cannot* be held that in case of infringement by public performance for profit of a musical composition the minimum damages are $250.00. Our point was made below, and we are encouraged to note that the Honorable District Court did not cite the Westermann case to support his decision. Our point was made in the Circuit Court of Appeals, and that court, in face of the authority *contra* has seen fit to certify the question to this court.

The recent statement of the Seventh Circuit Court of Appeals in the Dreamland Ball Room case, *supra*, (and the principal argument of plaintiffs against the Company's contentions on this point) that there are "too many judicial precedents" to permit adopting what seems undeniably the sensible construction would sound much more logical if the rule in question were a rule of property on which persons had relied, and a reversal of which would therefore cause an injustice to innocent parties; but this is a pure question of *damages*, and it is no argument for continuing the imposition of an outrageous punishment to say that such punishment has been inflicted by the District Courts in the past. The question is not settled. Only four of the ten Cir-

cuit Courts of Appeals have had it under consideration —(1) *Pastime Amusement Co.* v. *Witmark & Sons* (4th C. C. A., Dec. 1924, memorandum opinion only) 2 Fed. (2d) 1020; (2) *Berlin* v. *Daigle,* (5th C. C. A., 1929, Foster, J., Dissenting) 31 Fed. (2d) 832 and *Lutz* v. *Buck.* (5th C. C. A., 1930) 40 Fed. (2d) 501; (3) *Dreamland Ball Room* v. *Shapiro, Bernstein & Co.,* (7th C. C. A., Dec. 1929) 36 Fed. (2d) 354; and (4) the Eighth Circuit Court of Appeals in the case at bar. All of the above cited cases except one were decided after the suit at bar was brought. All rely for their ruling in the *Westermann* case; and the Eighth Circuit Court of Appeals has certified the question to this court in view of our argument that the *Westermann* case does not apply.

If the District Court was mistaken in the construction of the Westermann case, that mistaken impression should be corrected before further admitted injustice is unwittingly decreed.

3.

The Westermann case is not an authority for the proposition for which it has been cited, and does not, as has been generally supposed, require the court to assess $250 as a minimum in a case of infringement by public performance of a musical composition.

Before the decision in the Westermann case can be understood it is necessary to have a clear view of the facts of that case, for no case is law except as the opinion is applied to the facts. The defendant was a publisher of a newspaper in Columbus, Ohio. The plaintiff was the owner of the copyrights in six pictorial illus-

trations of styles of women's apparel. The defendant, without authority from plaintiff, published these illustrations as a part of paid advertisements for local dealers. Five of these six illustrations were published once. One was published twice but for different dealers. In stating the facts the court said (l. c. 103):

> "The defendant publishes at Columbus a daily newspaper, each issue comprising as many as thirty thousand copies, widely circulated."

The District Court had awarded $70.00 as *nominal* damages for the seven publications, considering each publication a separate infringement. Plaintiff appealed to the Circuit Court of Appeals for the Sixth Circuit, contending that *nominal* damages could not be awarded under Section 25 for the infringements thus proved. The Circuit Court of Appeals so held (233 Fed. 609). The "'no other case" clause was held to prevent any case of infringement from going unprovided for under Section 25, for that phrase clearly appears as a "catch-all" provision at least. Section 25 provides some measure of damage in lieu of actual damages for any type of infringement—nominal damages are therefore never properly awarded. The question in that case was to determine what measure of damages the statute provided for infringement of the type there under consideration. The Sixth Circuit Court of Appeals decided that $250.00 was the minimum damages assessable under Section 25 for each *case* where the infringement involved was the unauthorized publication of several copyrighted illustrations owned by one plaintiff, and allowed only that amount for the seven infringing pub-

lications. The court realized the harshness of applying the minimum limitation to each of the seven infringements. It said (l. c. 616):

> "While this is the first thought interpretation of the words of the law, yet we know it cannot be the real intent. The damages would have been 'irrationally increased, we believe Congress meant no such result.' "

The statute is plain that the minimum applies *to each infringement (singular) of a type coming within the "no other case" clause,* and so contending the plaintiff appealed to this court (249 U. S. 100). The opinion of this court decides three questions concerning the interpretation of the statute (and it is important that these three points of decision be well noted): (1) For each infringement coming within the "no other case" clause, the minimum damages assessable is $250.00; (2) the newspaper reproduction of a copyrighted pictorial illustration is an infringement coming within the "no other case" clause, and to publish six separately copyrighted pictorial illustrations constitutes six separate and distinct infringements, each entitling the copyright owner to the $250.00 minimum; (3) *the republication of the same copyrighted illustration by the same publisher for another dealer constitutes a separate, distinct and new infringement, entitling the copyright owner to the minimum amount of* $250.00 *for each infringement.* (This last point of decision is of controlling importance for, if infringing performances of musical compositions are a type of infringement covered by the "no other case" clause, the rule

(3) makes the statute self-contradictory, as will be pointed out hereinafter.)

This court expressly refused (l. c. 105-106) to decide the question whether a republication for the same dealer as a mere continuance of the first publication was a new and separate infringement. The number of infringements was not therefore determined by the number of suits brought or by the number of copyrights infringed, but by the number of newspaper reproductions of each copyright, and each infringement of the type there under consideration, (unlicensed publication in a newspaper; see Section 1 (b) of the statute) though of the same copyright, entitled the copyright owner to the minimum of $250.00.

To determine the applicability of the Westermann case as authority in the case at bar the character or type of the infringement under consideration by this court in the Westermann case must be analyzed. In the statement of facts in that case it appears that there were 30,000 copies of each edition in which the infringing illustrations were published. Plaintiffs in the case at bar contend that the Westermann case *decides* that the four subparagraphs are limited and controlled by the "no other case" clause of Section 25. To determine the correctness of this contention let it be assumed to be true—and then let us see the result of such assumption. What is the result when that interpretation is applied to the facts of the Westermann case itself? Under subparagraph "Second" which provides for "one dollar for every infringing copy made or

sold by or found in the possession of the infringer * * *," the plaintiff in the Westermann case (if the four subparagraphs are considered as applicable in that case) would be entitled to $30,000.00 for each infringing publication, as 30,000 copies of each illustration were made. But the opinion can be searched in vain for any mention of $30,000. If the Westermann case decided that the four subparagraphs are all controlled by the limitations in the "no other case" clause, then, as no actual damages were proved, to be consistent with this decision the court would have held not that not less than the minimum, $250.00, could be recovered for each infringement in that case but rather that no more than the maximum, or $5,000.00, could be recovered for each infringement. *The fact is (and this is apparent from the opinion) that neither the plaintiff, the defendant nor this court considered the infringements in that case as coming within the provisions of subsection second, and the court had no occasion to decide whether the four subparagraphs or any of them, were regulated or controlled by the "no other case" clause.* Everyone connected with the case, both parties and court considered the infringements to be *the newspaper reproduction of the illustrations* and not making copies, *and subsection second provides a measure of damages only where the infringement is of the latter type.*

A measure of damages for infringement of the copyright of a *photograph* by newspaper reproduction is expressly provided for: "in case of a newspaper re-

production of a copyrighted photograph such damages shall not exceed the sum of $200.00 nor be less than the sum of $50.00." Infringement by making copies of a photograph is likewise expressly provided for (subsection second). Infringement by making copies of an illustration is expressly provided for (subsection second). But Section 25 makes no *express* provision for damages in case of an infringement of the type there under consideration, to-wit: *the newspaper reproduction of an illustration.* This court, therefore, properly decided that in the case of the type of infringement under consideration in the Westermann case the "no *other* case" clause with its minimum and maximum limitations applied. The infringement in that case had to be construed as coming within the "no other case" clause if the statute was held to provide a remedy at all for such an infringement. This court was not considering a type of infringement covered by any of the four subparagraphs and it did not have occasion therefore to determine the construction of the statute with reference to the four subparagraphs. The only mention made of the four subparagraphs by this court in the Westermann case is the *obiter dictum* (the question was not before the court and not raised by counsel) that (l. c. 106):

> "* * * next, that the court may, in its discretion, allow the amounts named in the appended schedule."

That the court wished only to be considered as construing the statute as it applied to the type of infringe-

ment involved in the case then at bar, and nothing more is made apparent by the following paragraph in the opinion (l. c. 106):

> "* * * The court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, and the like, is made the measure of damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations."

In thus stating the rule which the court applied in that case the opinion omits mention of the amounts named in the four subparagraphs, and the rule stated is, therefore, clearly meant to apply only to the measure of damages in cases falling within the "no other case" clause. The limitations in the "no other case" clause as applied to the case then at bar were reasonable. The court expressly indicated its intention not to consider "matters which we have no occasion to consider now" (l. c. 105). The decision necessarily means by the above stated rule that "in every case *either not expressly provided for or which is to be construed as one of the 'other' cases referred to,* the assessment must be within the prescribed limitations." We will show later on in this brief that this interpretation of the opinion is the only possible one which will render the court's decision on this point consistent with the court's decision in the same case (l. c. 105) that "the second publication of an illustration must be regarded as another and distinct case of infringement."

4.

Reference to previous Copyright Statutes and to the Congressional Committee reports is convincing that the legislature did not intend that sub-paragraph "fourth" relating to infringing performances should be limited by the "no other case" clause.

Regarding the construction of the statute, it will be profitable to review briefly the history of the damage and penalty sections, or in other words, the *remedy* sections of our copyright statutes.

The first Copyright Act (Act May 31, 1790, First Congress, Session II, Chap. XV, Sec. 2, 1 Stat. 124) provided, among other things, a penalty of fifty cents for every sheet of infringing matter found in the infringer's possession. In 1802 the act was amended (Act April 29, 1802, Seventh Congress, Sess. I, Chap. XXXVI, Sections 3 and 4, 2 Stat. 171) providing, among other things, a penalty of one dollar for every print found in the infringer's custody. In 1831 the act was again revised (Feb. 3, 1831, Twenty-first Congress, Sess. II, Chap. 16, Secs. 6, 7, 4 Stat. 437) the new Section 6 providing a penalty of fifty cents for every sheet found in the possession of the infringer in the case of a book, and Section 7 among other things providing for forfeiture of one dollar for every sheet of a map, chart, musical composition, etc. As yet the copyright protection had extended only to the right to make copies of the physical thing copyrighted. There was no such thing as performing rights. In 1856 (Act August 18, 1856, Thirty-fourth Congress, Sess. I, Chap. 169, 11 Stat. 138) Congress for the first time ex-

tended the protection of copyright to the right to publicly perform any copyrighted dramatic (not musical) composition. To usurp this right was declared an infringement. But Congress provided an entirely different type of remedy for infringement of this new right to perform. The statutes to this time all provided stipulated penalties in set amounts, one-half of which was to go to the United States. By the new act granting *performing* rights in dramatic compositions Congress declared the infringer "liable for damages," and provided that "such damages in all cases (are) to be rated and assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance as to the court having cognizance thereof shall appear to be just." The distinction of *penalties* for "making copies" and *damages* for "performing" was preserved in the revision of the copyright laws in 1870 (Act July 8, 1870, Forty-first Congress, Sess. II, Chap. 230, Secs. 100, 101, 16 Stat. 214). Section 100 provided for a penalty of one dollar for every sheet of infringing matter found in the possession of the infringer, etc., and ten dollars for every copy of a statute, etc., "one moiety thereof to the proprietor and the other to the use of the United States." Section 101 practically reenacted the Act of 1856 as to *damages* for performance. The Act of March 3, 1891, Chap. 565, Sec. 8, amending Section 100 (26 Stat. 1109) was a substantial reenactment of that section and the distinction was still preserved. It is to be noted that until this time the minimum

($250) and maximum ($5,000) limitations which are the occasion of this appeal were not to be found in the copyright law. A minimum was found in the "performing" statute, but that statute was purely a "damage" statute and not a "penalty" statute, *and the minimum limitation there found ($100 for first and $50 for every subsequent performance) corresponds identically with the amounts found in the present subsection "Fourth" of Section* 25.

The "copies" section (Sec. 100) became Section 4965, and the "performance" section (Sec. 101) became Section 4966 of the Revised Statutes. Two cases were decided by the Supreme Court in 1899 (but arose before the 1895 revision of the statute) construing these two sections. *Brady* v. *Daly*, 175 U. S., 148, construing Section 4966 (performing rights section) was decided first. It is cited in the Westermann case and quotations at length are made from the opinion. The case involved the infringement of the copyright of a dramatic composition by infringing performances of a scene therein. It was contended that the two year penal statute of limitations applied because Section 4966 provided for penalties. The lower court held that it had jurisdiction of the case, that the evidence did not authorize an increase in damages above the minimum, but that he could not award less, and decree was entered for $50.00 for each of one hundred and twenty-six performances given in the two preceding years, or $6,300.00—recovery being limited to two years on the ground that the statute was penal (see 175 U. S. l. c.

151-152). Defendant appealed on the ground that the statute being penal, the Circuit Court had no jurisdiction. The judgment was affirmed in this court but on the ground that the statute was *not* penal and the minimum recovery for each infringement did not make it so. The court stated that recovery could have been had for more than the two years allowed had appeal been taken by the plaintiff (l. c. 161). Where the infringement, then, was by public performance, Congress sought by Section 4966 to give *damages*, but not to punish the offender.

Then the case of *Belles* v. *Outing Co.*, 175 U. S. 262, construing Section 4965 ("copies" section) was decided. Many infringing copies of a copyrighted photograph had been sold by the defendant, but only one copy was found in his possession. The court held that only one dollar could be recovered on the ground that as Section 4965 ("copies" section) was penal, it should be strictly construed. Where the infringement, then, was by making copies, Congress sought by Section 4965 to give a *penalty*.

In 1895 (Act March 2, 1895, Fifty-third Congress, Sess. III, Chap. 194, 28 Stat. 965) Section 4965 ("copies" section) was amended by adding the following proviso:

> "Provided, however, that in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be *not less than one hundred dollars, nor more than five thousand dollars*, and: Provided, further, that in case of

any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than *two hundred and fifty dollars, and not more than ten thousand dollars.* One-half of all the foregoing penalties shall go to the proprietor of the copyright and the other half to the use of the United States" (italics ours).

The Committee on Patents, in recommending the latter bill for passage, said:

> "This amendment makes no substantial change in the existing law, except to moderate the rigor of the penalties established." (H. R. No. 1733 3rd session, 53rd Congress, 1894-95 Vol. 1.)

For the first time (in 1895), we find the maximum and minimum limitations now under consideration. Section 4965, the penalty statute, the "copies" section, was amended by incorporating the maximum and minimum limitations "to moderate the rigor of the penalties established." Section 4966, the damage statute, the "performing" section, was not amended by Congress. Penalties should be limited, but there is no reason for limiting recovery under a *compensatory* statute. It was held in *Boston Traveler Co.* v. *Purdy*, 137 Fed. 717, that the penal character of Section 4965 was not changed by the amendment. The distinction, then, between infringement by copying and infringement by performing on the question of remedy was still preserved by Congress.

By Act January 6, 1897, Chap. IV, 29 Stat. 481, Section 4966 was amended to include for the first time performances of musical compositions in the list of infringements by performance, with the same remedy as that given for infringing performances of a dramatic composition.

Thus stood the law at the time the matter of revision of the copyright laws was referred to the Patent Committee in 1908. The bill to "amend and consolidate the Acts respecting copyright" was prepared and presented. It is clear that the purpose of Section 25 of the New Act was to incorporate into one section old Sections 4965 and 4966, and to remove the penal character of Section 4965 by granting greater discretion to the courts and by eliminating the provision that one-half of the recovery was to go to the United States. It need hardly be said the wording and arrangement of the new statute is obscure. We have shown that the courts have expressly recognized this fact. To help clarify this ambiguity or obscurity the court may resort to the committee reports and prior statutes.

> "Reports of committees of House or Senate * * * may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure" (*Duplex Co.* v. *Deering*, 254 U. S. 443, l. c. 474).

In *Northern Commercial Co.* v. *U. S.*, (9th C. C. A. 1914) 217 Fed. 33, it is said, l. c. 35-36:

> "As a premise, certain well established principles of construction may be recounted. The court may with propriety, where the language of

the statute appears to be ambiguous or the meaning doubtful, put itself so far as possible in the light that the law makers enjoyed, and view the situation as it appeared to them, and thereby ascertain and discover the purpose and intendment of the enactment from the language employed, in connection with the attending conditions and circumstances, including the history of the times. *United States* v. *Union Pacific Railroad Co.*, 91 U. S. 72, 79, 23 L. Ed. 224; *Platt* v. *Union Pacific Railroad Co.*, 99 U. S. 48, 64, 25 L. Ed. 424; *Smith* v. *Townsend*, 148 U. S. 490, 494, 13 Sup. Ct. 434, 37 L. Ed. 533.

"Statutes relating to the same subject-matter must be construed *in pari materia*. This may include earlier acts and such as have expired or been repealed as well. * * *

"Effect, if possible, must be given to every word and phrase of the statute, so as to render it a harmonious whole; and the words 'or' and 'and' are sometimes convertible, as the sense may require."

In *Forlini* v. *U. S.*, 12 Fed. (2d) 631 (2d C. C. A. 1926) it is said (l. c. 633):

"Reference may be had, in the construction of this statute, to prior acts, in order to solve any ambiguity which may exist."

In *Stockyards Loan Company* v. *Nichols*, (8 C. C. A. 1917) 243 Fed. 511, it was said (l. c. 516):

"In order to ascertain the intention of the legislature * * * the court may look to each part of the statute, to other statutes upon the same or related subjects, the old law upon the subject, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation."

We must therefore consider the present statute in light of the rules and guides to construction above set out. That Congress did not, by consolidating Sections 4965 and 4966 into Section 25 of the 1909 Act, intend to make the old maximum and minimum limitations which had been previously applied only to penalties assessed under Section 4965, the "copies" section, applicable to infringement by public performance, clearly appears from the committee report (Report 2222, 60th Congress, 2nd Session, Vol. 1, H. R., pp. 15-16). Quoting from the committee report:

> "The provision that in lieu of actual damages and profit, such damages shall be awarded as shall appear to the court just, not exceeding the sum of $5,000.00 is a modification of existing law *decreasing instead of increasing the amount* which may be obtained in this way. * * * The special limitation as to the amount of damages which may be recovered in case of a newspaper reproduction of a copyrighted photograph is made because such reproduction has little permanent value or usefulness and a reproduction in this form does not damage the copyright proprietor to as great an extent as would the reproduction and sale of copies of the photograph in a different form" (italics ours). Report 2222, 60th Congress, 2nd Session, Vol. 1, H. R., pp. 15-16.

It can be seen from this statement of the committee that the "modification of existing law" intended was the reduction of the maximum limitation in old Section 4965 ("copies" section) fom $10,000 to $5,000. There is no language evidencing an intention to subject to the maximum and minimum limitations in

paragraph (b) of Section 25 (formerly found only in Sec. 4965) the amounts recoverable for infringing public performances under old Section 4966 ("performing" section). That such was not the intention also appears from the committee's comment on the fourth sub-paragraph:

> "*The fourth is a substantial re-enactment of existing law,* which provides that the damages for an infringement of any dramatic or musical composition shall be not less than $100.00 for the first performance and $50.00 for each subsequent performance, *but we have modified this provision in the bill by fixing the damages for an infringing performance of a purely musical composition at* $10.00" (italics ours).

There is no suggestion in the whole report of the intent to subject the provisions of old Section 4966 to the arbitrary limits of old Section 4965. The remedy providing for infringing *performances* was apparently entirely satisfactory, except in the case of infringing performances of musical compositions. As to such infringements the committee felt the old minimum too high and *reduced it to* $10.00 *for each infringing performance.*

It is not necessary to decide in this case whether sub-paragraphs first and second of the present Section 25 are within the limitations of the "no other case" clause. They state a measure of damages for infringing "copies," and might be so construed. The form of the statute should not be used as an excuse to defeat the clear intention of the legislature. It is clear that Congress never intended to include sub-paragraphs third and fourth (providing a measure

of damages for infringing performances) within the limitations of the "no other case" clause. Such infringements were not intended to be considered as "other" cases. This court itself suggested in the Westermann case that there was a distinction between the first two and the latter two sub-paragraphs (249 U. S., l. c. 106):

> "What bearing the third and fourth subdivisions of Section 25 before quoted, would have on the solution of that question, are matters which we have no occasion to consider now."

By way of summarizing the history of the Copyright Statutes, we note:

1. That Congress has always distinguished in the matter of remedy between infringing by performing and infringing by copying.

2. That the limitations found in the "no other case" clause have never been applied to infringing performances.

3. That Congress did not intend to change the law in this respect by the enactment of Section 25.

5.

The Westermann case cannot be applied to infringement of a musical composition copyright by public performance because if so applied the statute becomes inconsistent with itself.

We now refer to the second and third points of decision in the Westermann case mentioned *supra*, page 16. Each copyrighted illustration infringed by newspaper reproduction entitles the owner thereof to

the minimum limitation in the "no other case" clause, to-wit, $250.00. Also each newspaper reproduction of the *same copyrighted illustration* is a distinct infringement and the minimum limitation applies to *each publication.* That each public *performance* of a dramatic composition is a distinct infringement is settled by the decision in *Brady* v. *Daly, supra,* holding that for 126 performances of the same dramatic composition $6,300.00 was the minimum recovery under old Section 4966. The decision in the Westermann case, as to infringements by newspaper reproduction, cannot possibly be applied to infringements covered by the third and fourth sub-paragraphs (infringements by performance), if effect is to be given to the entire statute, for *if the third point of decision is thus applied, each performance of the same copyrighted musical composition, being a separate and distinct infringement, would require that the minimum of* $250.00 *be assessed.* If the Westermann Case is applicable to infringing performances, all three points of decision apply to such infringements; with the result that if the same selection is played 25 times on as many nights in defendant's hotel, defendant is not liable for $250.00 ($10.00 for each performance) but rather for $6,250.00 ($250 for each performance) since each performance of the same copyrighted selection under the Westermann and Brady cases is a separate infringement, and the limitations in the "no other case" clause are applicable to each *infringement* of the same copyright, and not to each *case* of several infringements!

If the Westermann case decision is applicable to infringements by *performance*, the only possible time that the fourth sub-paragraph of Section 25 could apply would be when some proprietor of a public place locked his customers in and had the same orchestra play the same copyrighted selection to the same people on the same night more than twenty-five times. In which event the cause of action for infringement would probably not survive the death of the infringers. And even supposing such an impossible case, this court in the Westermann case (if the decision is applicable to infringing performances) expressly leaves the question open whether each of *these* renditions would not be a separate infringement subject to the minimum limitation of $250.00 in the "no other case" clause! If the Westermann case is held to have construed the statute as to sub-paragraph "fourth" the statute in effect necessarily is to be read as follows:

> "The court may, in its discretion, allow the amounts as hereinafter stated * * * fourth * * * in the case of musical compositions, ten dollars for each infringing performance, * * * but in no case of an infringing performance of a musical composition shall such damages exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars."

That this is the result of the holding of the District Court is made clear by the fact that no court has ever, under the construction of the statute for which plaintiffs contend, found occasion to apply the provisions of sub-paragraph four to any case, though the books are full of cases of infringing performances of copyrighted compositions.

Conclusions.

We respectfully submit that this court should correct the general misapprehension as to the meaning of the decision in the Westermann case. The lower courts have frequently expressed the desire to decide in favor of the construction for which we now contend, and would, we feel, undoubtedly have so decided had the import of the Westermann case decision and the history of the statute been completely presented. The stipulated amounts in Section 25 are intended to take the place of actual damages; they are not penalties for criminal acts but damages for an innocent trespass. If the infringement is willful, the statute expressly provides that the limitations are not applicable. If more damage is suffered it may be shown—the copyrighter is not limited to the amounts named, as they apply only when actual damage is not shown.

The argument made that Congress intended to compensate a copyright owner for bringing suit, etc., will not bear analysis. Suit must be brought to recover any civil damages; plaintiff must engage counsel, but defendant is made liable for the attorneys' fees (Sec. 40); if depositions have to be taken they are at the cost of defendant if defendant loses the case; and as to "going to a distant place for trial," such action is not necessary. Trial is usually had in the district where the infringement takes place and where the witnesses are located. *The* $10.00 *recovered is over and above all legitimate expense and cost of trial.* If a defendant knows that an unauthorized performance will

cost him $10.00 plus attorneys' fees for both sides of the case plus all costs of litigation, he is not likely to deliberately infringe, and if the infringement is innocent, he should not be penalized therefor. It is clear that absent expense of litigation, $10.00 is more than ample recompense for the hypothetical injury resulting from the general type of unpermitted performance, and an innocent infringer being shown that he has infringed would pay that amount to avoid litigation and the incidental expense thereof.

We respectfully submit that question II should be answered in the negative, and that question III should be answered in the affirmative. In view of the statement of facts it appears to us that question IV is not decisive, but from the argument above it would seem to follow that the limitations do not apply to any infringement after actual notice and the question should therefore be answered in the negative.

Respectfully submitted,

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

October Term, 1930.

No. 140.

JEWELL-LASALLE REALTY COMPANY, a corporation,
Appellant,

vs.

GENE BUCK, as President of the American Society of Composers, Authors, and Publishers, and LEO FEIST, INC., a corporation,
Appellees.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES.

THOMAS G. HAIGHT,
NATHAN BURKAN,
LOUIS D. FROHLICH,
E. S. HARTMAN,
MAURICE J. O'SULLIVAN,
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ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES.

Statement of the Case.

This action was brought by the appellees against the appellant in the United States District Court for the Western District of Missouri, and was based on an alleged infringement of a copyrighted musical composition.[1] An injunction and damages were sought. The copyright is owned by one of the plaintiffs and the other plaintiff has

[1] The appellees in the court below will hereafter be referred to as the plaintiffs and the appellant as the defendant.

the exclusive non-dramatic performing rights thereunder.[2] The bill of complaint contains several counts, but this case is concerned only with the seventh. The only other count involved in the decision of the District Court is the subject matter of case No 139, and is discussed in the brief which was filed in that case and in case No. 138.

The infringement alleged was that the defendant, by means of an *orchestra*, gave, without plaintiffs' consent, a public performance for profit of plaintiffs' copyrighted musical composition in a hotel which it owned and operated in Kansas City.[3] The infringement was not denied, and a decree for an injunction and statutory damages of $250 was awarded plaintiffs.[4] There was no proof of actual damages or profits.[5] It was the defendant's contention in the courts below that the plaintiffs were entitled to only $10 statutory damages, while plaintiffs contended that $250 was the minimum which the Court could allow. The District Court agreed with the plaintiffs.[6] The Circuit Court of Appeals for the Eighth Circuit has certified the question or questions thus presented to this Court.

The precise questions certified are set forth on page 3 of defendant's brief and on page 9 of the Certificate, and will not be here repeated.

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[2] Cert. pp. 2 and 3.
[3] Cert. pp. 8, 3.
[4] Cert. p. 8.
[5] Cert. p. 8.
[6] 32 Fed. (2) 366, 368.

SUMMARY OF ARGUMENT.

(1) The decision of this Court in *Westermann Co.* v. *atch Printing Company*, 249 U. S. 100, controls this and requires that, in the absence of proof of actual ages suffered by a copyright proprietor or the profits ized by an infringer, the Court must award, as a mini-, damages of $250.00 for a single infringing perform- of a copyrighted musical composition. Although that sion did not deal with the infringement of the perform- rights in a copyrighted musical composition, yet the con- ction which this Court there gave to Section 25 (b) of Copyright Act of 1909 in respect to the damages to be wed for the kind of infringement involved in that case essarily applies to infringing performances of copy- ted musical compositions. The statute makes no dis- tion between the two kinds of infringement as to the mum and maximum statutory damages which must be wed. The reasoning of this Court is as applicable to one as to the other.

(2) The lower Federal Courts have consistently con- ed Section 25 (b) in respect to the minimum statutory ages which must be allowed for infringing perform- s of copyrighted musical compositions, the same as we end that the decision of this Court in the *Westermann* requires. Three Circuit Courts of Appeals and ten rict Courts, whose decisions have been reported, have eld. A certiorari has been denied in one case. This truction has prevailed since 1918 and Congress has not nged the statute.

(3) From the foregoing it follows that Question II ld be answered in the affirmative; and that Question III ld be answered in the negative unless the total number nfringements equal or exceed 25, and in the affirmative ey do equal or exceed that number so that at $10.00 , the total damages to be awarded shall not be less than 0.00.

(4) The clause of Section 25 (b) quoted in Question IV covers all cases for which that section provides maximum statutory damages, whether such cases come under the "no other case" clause or are those for which maximum damages are specifically provided. Hence Question III should be answered in the negative.

ARGUMENT.

I.

THE DECISION OF THIS COURT IN WESTERMANN COMPANY V. DISPATCH PRINTING COMPANY, 249 U. S. 100, CONTROLS THIS CASE, AND REQUIRES, THAT IN THE ABSENCE OF PROOF OF ACTUAL DAMAGES SUFFERED BY A COPYRIGHT PROPRIETOR OR OF THE PROFITS REALIZED BY AN INFRINGER, A COURT MUST AWARD AS A MINIMUM, DAMAGES OF $250.00 FOR A SINGLE INFRINGING PERFORMANCE OF A COPYRIGHTED MUSICAL COMPOSITION.

Section 25 (b) of the Copyright Act of 1909,[7] which is quoted in full in defendant's brief, provides that a copyright proprietor shall be entitled for an infringement of his copyright, among other remedies, to recover the damages that he may have suffered from the infringement, as well as the profits which the infringer shall have realized, or "in lieu of actual damages and profits such damages as to the court shall appear to be just", with certain maximum and minimum limitations. This section was construed by this Court in *Westermann Co.* v. *Dispatch Printing Co., supra.*[8] In that case, a newspaper had infringed by publishing certain copyrighted pictorial illustrations of styles in women's apparel. There was no proof of actual damages sustained

[7] Title 17, U. S. Code, p. 87.

[8] The Section as quoted in the opinion in the *Westermann* case was amended by the Act of August 24, 1912, Chap. 356, 37 Stat. at L. 488; but, so far as the point now under discussion is concerned, the amendment was of no moment as it simply provided certain specific maximum and minimum damages for particular infringements which are not involved in this case and which were in addition to those originally enumerated.

by the plaintiff or of the profits which the infringer had realized. One of the two questions before the Court was—What were the minimum statutory damages that a court could allow under these circumstances for each infringement? The Circuit Court of Appeals for the Sixth Circuit had held[9] that the minimum was $250. In affirming that Court on this point, this Court, speaking through Mr. Justice VAN DEVANTER, said (p. 106):

> "On the question of the amount of damages to be awarded for each case we are in accord with the circuit court of appeals. Both parties recognize that, *under the proofs,* the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. *There is no uncertainty as to what that measure is or as to its limitations.* The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule; and finally, that *in no case* shall they be more than $5,000. nor less than $250., except that for a newspaper reproduction of a copyrighted photograph they shall not be more than $200. nor less than $50. In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, and the like, is made the measure of the damages to be paid, but with the express qualification that *in every case* the assessment *must be within the prescribed limitations;* that is to say, neither *more than the maximum nor less than minimum.* Within these limitations the

[9] 233, Fed. 609.

court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them." [10]

It is quite as difficult to perceive how the meaning of Section 25 (b) could have been more clearly expressed, as it is to understand how there can be any doubt that the interpretation so given to it applies to the minimum damages which must be allowed in *all* cases within its purview. The "appended schedule" referred to in the opinion is, of course, the four concluding paragraphs of the section, designated as "First", "Second", "Third" and "Fourth". The application of Section 25 (b) to the cases where the copyright in a musical composition has been infringed by public performance thereof for profit, in the light of the *Westermann* case, seems to be entirely clear and free from doubt, *i. e.*, if no actual damages or profits are proven, the Court may, in its discretion, allow for every infringing performance of the same composition $10 (the amount specified in Paragraph "Fourth") but the total amount thus allowed shall not exceed the sum of $5,000, nor be less than $250. How could anything be plainer? While the *Westermann* case dealt with the infringement of a copyright in a pictorial illustration, the interpretation which this Court gave to the statute in that case must necessarily apply to the infringement of the performing rights in a copyrighted musical composition. There is no *specific* minimum and maximum provided for in respect to an infringement either of a pictorial illustration or of the performing rights in a musical composition, such as there is for the infringement of a copyrighted photograph by newspaper reproduction, or of dramatic and non-dramatic works by

[10] Italics ours.

motion pictures. Each comes within the "no other case" clause of the Section. In Paragraph "Second" of the schedule, as pointed out in the opinion in the *Westermann* case,[11] there is a specific provision as to what the Court *may* allow, in determining what damages "shall appear to be just", for every infringing copy "made or sold by or found in the possession of the infringer". In Paragraph "Fourth" of the schedule, there is a similar provision as to what the Court *may* allow for every infringing performance of a musical composition. Consequently, there is no conceivable reason why the minimum and maximum limitations provided for in the "no other case" clause of Section 25 (b), which this Court has held applies to the infringement of a pictorial illustration, should not likewise apply to the infringement of the performing rights in a copyrighted musical composition. The statute does not differentiate between them. On the contrary, the "no other case" provision unquestionably, if effect is to be given to clear and explicit language, must be held to cover *all cases* enumerated in the statute where a different minimum and maximum is not provided.

It is contended by the defendant that this Court did not, in the *Westermann* case, consider the infringement there in question as coming within the provisions of Paragraph "Second" of the schedule and that the Court "had no occasion to decide whether the four sub-paragraphs, or any of them, were regulated or controlled by the 'no other case' clause". This is clearly incorrect. It is stated in foot-note 2 of the opinion that " 'prints and pictorial illustrations' are among the copyrightable works enumerated in Section 5", and Paragraph "Second" specifically provides that in the case of any work enumerated in section "five" (except

[11] See Footnote No. 2.

a painting, statue or sculpture), the Court may award as damages $1 for every infringing copy. Pictorial illustrations were the subject matter of that suit. As this Court held the infringer to be within the "no other case" clause and, as it was recognized that the infringer was likewise within Paragraph "Second" of the schedule, there is no justification whatever for defendant's assertion that the Court had no occasion to decide whether any of the four paragraphs of the schedule were controlled by the "no other case" clause.

It is urged[12] that, if this Court had considered Paragraph "Second" of the schedule to be controlled by the "no other case" clause, then it should have allowed not the minimum of $250, but the maximum of $5,000, because 30,000 copies of the infringing illustration had been made. This contention overlooks, however, that the Court is permitted "in lieu of actual damages and profits" to allow "such damages as to the Court shall appear to be just" and that, in assessing such damages, it "*may* in its discretion *allow the amounts stated in the respective schedules*". It is not *required* to do so.

It is also urged by defendant[13] that the construction which the *Westermann* case gave to Section 25 (b) cannot be applied to the infringement of a musical composition by public performance because, in that event, the statute would become "inconsistent with itself". The argument seems to be that each public performance of the same copyrighted musical composition is a separate and distinct infringement and would require a minimum of $250 to be allowed as damages for each performance, and that, therefore, if the "no other case" provision is applicable to such infringements, Paragraph "Fourth" of the schedule could apply only

[12] Point 3 of defendant's brief, p. 14. [13] Point 5 of defendant's brief, p. 30.

where the proprietor of a public place had the same selection played to the same people on the same occasion more than 25 times. Presumably, 25 times is taken so that at $10 a performance the total would be $250. This argument, as in the case of the one just referred to, fails to take into account that the statute leaves the amount of the statutory damages to be awarded for a *series* of separate infringements of the same copyright, as well as for *one* infringement, to the discretion of the judge, and provides that he *may* allow $10 for each infringing performance, no matter how many there may be, provided that the minimum amount of such damages awarded against the same infringer shall not be less than $250 nor more than $5,000.

Defendant's brief reviews the legislative history of the remedial special provisions of the Copyright Acts from the first of such acts down to the Act of 1909 and contends that, as a result thereof, the "no other case" clause of Section 25 (b) was not intended to apply to "infringing performances". The argument is rather involved, but, as we understand it, it is in brief this: Section 25 (b) was a consolidation of Sections 4965 and 4966 of the Revised Statutes,—the former being of a penal nature and the latter remedial; that the new section removed the penal character as to cases formerly coming within Section 4965; that there is no language indicating an intention to impose the total maximum and minimum limitations of the penal Section 4965 to cases coming within old remedial Section 4966 (which provided *damages* for infringement of the performing rights in dramatic and musical compositions); and that a contrary intention appears from the report of one of the Committees of Congress at the time the bill was under discussion.[14] The obvious answer to this argument is that Sec-

[14] This latter report is quoted on page 29 of defendant's brief.

tion 25 (b) of the Act of 1909 was a codification, and, if it had been the intention of Congress to have the maximum and minimum of the "no other case" clause of the section apply to infringements of the character specified in some of the paragraphs of the schedule and not to others, that intention would, of course, have been expressed. Defendant admits that Paragraph "Second" was a part of Section 4965 R. S., and, in its original environment, was subject to the maximum and minimum provisions. There is nothing in Section 25 (b) to indicate that the maximum and minimum provisions of that section should not apply to Paragraph "Fourth" of the schedule as well as to Paragraph "Second". As before pointed out, this Court has held in the *Westermann* case that cases falling within Paragraph "Second" of the schedule are subject to the maximum and minimum limitations of the section. The committee report referred to on page 29 of defendant's brief is in no way inconsistent with our position. Moreover, we think the contention of the defendant is clearly disposed of by what this Court said in the *Westermann* case. After reviewing the previous damage and penalty provisions of the Copyright Act, this Court said (p. 107):

> "In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the 'in lieu' provision now under consideration. *True, they were broadened so as to include* other *copyrights*, and the *limitations were changed in amount*, but *the principle on which they proceeded*—that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—*was retained.* The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just.' Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation." [15]

[15] Italics ours.

Finally, it is urged that if the statute be construed as requiring minimum damages for a single infringement of a copyrighted musical composition, it would attribute to Congress an intention "to extract unconscionable penalties in favor of private parties". This argument is fully answered by the Circuit Court of Appeals for the Sixth Circuit in *Westermann Co.* v. *Dispatch Printing Co.*,[16] where Judge DENNISON said:

> "The necessary effect of the provision is to prohibit the award of merely nominal damages. *This intent implies no undue harshness.* Not only does the typical copyright infringement, if not every one, involve indirect damages almost sure to be considerable, but in few cases would one sum of $250. more than compensate plaintiff for his time, trouble and expense in detecting, following up and prosecuting an infringement."

The reason for providing minimum statutory damages for infringements of copyrights is fully discussed in *Brady* v. *Daly*, 175 U. S. 148.

If an infringer could never be required to pay more than $10 as statutory damages for infringing the performing rights in a copyrighted musical composition, it requires no great imagination to appreciate that the incentive for infringement would be accelerated, because, in the very nature of things, the ascertainment of ordinary damages or profits in all but exceptional cases would be impossible and, if the copyright proprietor could only recover $10 for each infringement, the cost of seeking out, ascertaining and prosecuting infringers would be so vastly in excess of that sum and a reasonable counsel fee, that it could hardly be expected that any effort to prevent infringements would be undertaken.

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[16] 233 Fed. 613. (Italics ours.)

II.

THE LOWER FEDERAL COURTS HAVE CONSISTENTLY CONSTRUED SECTION 25 (b) IN RESPECT TO THE MINIMUM STATUTORY DAMAGES WHICH MUST BE ALLOWED FOR INFRINGING PERFORMANCES OF COPYRIGHTED MUSICAL COMPOSITIONS IN THE SAME WAY THAT WE CONTEND THAT THE DECISION OF THIS COURT IN THE WESTERMANN CASE REQUIRES.

Three Circuit Courts of Appeals have held (one of them twice) that the minimum damages which a court can allow for infringement of the performing rights in a copyrighted musical composition, where there is no evidence of actual damages, is $250. This Court has denied a writ of certiorari to review the holding of the last of these cases.

See:

Pastime Amusement Co. v. *Witmark*, 2 Fed. (2) 1020 (C. C. A. 4th Circuit);

Irving Berlin, Inc. v. *Daigle*, 31 Fed. (2) 832 (C. C. A. 5th Circuit);

Dreamland Ball Room, Inc. v. *Shapiro, Bernstein & Co.*, 36 Fed. (2) 354 (C. C. A. 7th Circuit);

Lutz v. *Buck*, 40 Fed. (2) 501 (C. C. A. 5th Circuit); Certiorari denied October 20, 1930 (282 U. S. —).

In addition, the following reported decisions in the District Courts are to the same effect:

Witmark v. *Pastime Amusement Co.*, 298 Fed. 470 (Dist. Ct., E. D., S. Ca.);

Waterson, Berlin & Snyder Co. v. *Tollefson*, 253 Fed. 859 (Dist. Ct., S. D. Cal., S. D.);

Remick v. *General Electric Co*, 16 Fed (2) 829 (Dist. Ct., S. D., N. Y.);

Witmark v. *Calloway*, 22 Fed. (2) 412 (Dist. Ct., E. D. Tenn., N. D.);

Fisher v. *Dillingham*, 298 Fed. 145 (Dist. Ct, S. D., N. Y.);

Buck v. *Heretis*, 24 Fed. (2) 876 (Dist. Ct., E. D., S. Ca.);

Buck v. *Lester*, 24 Fed. (2) 877; (Dist. Ct., E. D., S. Ca.);

Buck v. *Milam*, 32 Fed. (2) 622; (Dist. Ct., D. Idaho, E. D.);

Buck v. *Duncan*, 37 Fed. (2) 366 (Dist. Ct., W. D. Mo., W. D.);

Sauer v. *Detroit Times Co.*, 247 Fed. 687 (Dist. Ct., E. D., Mich., S. D.).

Only one District Judge has held to the contrary, and he was promptly overruled by the Circuit Court of Appeals for the Fifth Circuit in *Irving Berlin, Inc.*, v. *Daigle, supra.*

Defendant's brief [17] quotes extracts from the opinions of some of the lower court judges to the effect that "on the first reading" or "from a casual reading" of Section 25 (b) such judges were under the impression that $10 rather than $250 was the minimum that could be allowed for infringing the performing rights in a copyrighted musical composition. The first of these extracts is from the opinion of Judge BLEDSOE in *Waterson, Berlin & Snyder Co.* v. *Tollefson, supra.* In that case, however, he said, in addition:

> "However, *upon more careful study of the section* [18] and consideration of its various terms, and more particularly upon considering and reading the section as it appeared previous to its amendment in 1909, I am of the opinion that this is one of the 'other cases' referred to in clause 'b' of section 25, supra, and that the minimum damages to be awarded for the infringement shown should be $250.

[17] pp. 8 and 9. [18] Italics ours.

> The provision for an allowance of 'ten dollars' must be held to apply where a large number of infringements have been shown; this figure may be used by the court as a basis for its computation of the entire damages by assessing each infringement at $10., if such method of computation, under all the circumstances, 'shall appear to be just'; but in the event the total number of infringements, computed on the $10. basis, do not amount to $250., nevertheless, pursuant to the mandatory terms of the statute contained in the provision last above referred to relating to 'other cases', the court may not award damages in a sum less than $250. So, also, no matter how many separate infringements may be proved, no 'actual' damages being shown, the court may not mulct the defendant in damages in excess of the maximum sum mentioned, to wit, $5,000."

It will be noted that he reached the conclusion that the $250 was the minimum amount of statutory damages, before this Court had rendered its decision in the *Westermann* case.

Another extract is from the opinion of Judge COCHRAN in *Witmark & Sons* v. *Pastime Amusement Co., supra.* But Judge COCHRAN said in addition:[19]

> "But *a careful study of* the act in the light of the decision of the Supreme Court in *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100, convinced me that such is not the proper construction."
>
> * * * * * * *
>
> "When the statute is carefully studied in the light of this decision and the decision of the Circuit Court of Appeals in the same case (233 Fed. 609, 147 C. C. A. 417), the conclusion is irresistible that the proper construction of the section is that paragraphs 'first',

[19] At pp. 481-482.

'second', 'third', and 'fourth' may be resorted to by the court in cases to which these paragraphs respectively apply in assessing such damages as may appear just, but the court must in all cases assess such damages at not less than $250. nor more than $5,000., except where other specific provision is made in subdivision (b) itself."

The extracts from the dissenting opinion of Judge FOSTER in *Irving Berlin, Inc.* v. *Daigle, supra,* have no application to the question now under consideration, because the infringement complained of in that case was "the use of a phonograph record for a public performance for profit". Judge FOSTER was of the opinion that the provisions of Section 25 (e) of the Copyright Act, which relate to the damages that a copyright proprietor may recover under certain conditions for infringement by the unauthorized manufacture and sale of phonograph records, applied to the infringement complained of in that case.

It is, of course, significant that although the foregoing construction has prevailed since 1918, when Judge BLEDSOE decided *Waterson, Berlin & Snyder* v. *Tollefson, supra;* yet *Congress has not changed the statute.*

III.

THE CLAUSE OF SECTION 25 (b) QUOTED IN QUESTION IV COVERS ALL CASES FOR WHICH THAT SECTION PROVIDES MAXIMUM STATUTORY DAMAGES.

We are in accord with counsel for defendant in failing to perceive that an answer to Question IV is material to the decision of this case. The plaintiff did not ask for more than the minimum statutory damages, and hence, the question as to whether the Court in this case could have allowed more than $5,000.00 statutory damages, did not arise.

Nor are we entirely certain that we understand the question.

If, as we think, the inquiry is whether the clause quoted in the question is confined in its application to those infringements *specifically* referred to in Section 25 (b) as distinguished from those coming under "no other case" clause, then the question should be answered in the negative.

Section 25 (b) provides for statutory damages in *all* cases of copyright infringement where no actual damages or profits are shown, and therefore, "the limitation as to the amount of recovery" in the clause quoted in the Question IV, would seem unquestionably to apply to the infringements provided for in the "no other case" clause, as well as the *specific* infringements referred to in that section.

CONCLUSION.

It follows from the foregoing that the questions certified should be answered as follows:

(a) Question II should be answered in the affirmative.

(b) Question III should be answered in the negative, unless the total number of infringements equal or exceed 25; and in the affirmative if they equal or exceed that number, so that at $10.00 each the total damages to be awarded shall be $250 or more.

(c) Question IV should be answered in the negative.

Respectfully submitted,

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EME COURT OF THE UNITED STATES.

No. 140.—October Term, 1930.

ewell-LaSalle Realty Co., vs. Buck, as President, et al. — On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[April 13, 1931.]

Justice Brandeis delivered the opinion of the Court.

American Society of Composers, Authors and Publishers, e of its members sued the Jewell-LaSalle Realty Company federal court for Western Missouri for an unauthorized al performance of a musical composition for which they e exclusive non-dramatic performing rights. The infringe- as proved, but there was no showing of actual damages. fendant contended that the plaintiffs were entitled to only tutory damages; the plaintiffs that $250 was the minimum le under the Copyright Act of 1909. The court granted action and awarded $250 damages, 32 F. (2d) 366, 368. The nt appealed; and the Circuit Court of Appeals certified ns numbered II, III and IV relating to the subject of s.[1]

tion II. "In a case disclosing infringement of a copy- vering a musical composition, there being no proof of actual s, is the court bound by the minimum amount of $250 set the so-called 'no other case' clause of Section 25 (b) of pyright Act (17 U. S. C. Sec. 25), reading, 'and such s shall in no other case exceed the sum of $5,000 nor be less e sum of $250, and shall not be regarded as a penalty?'"

provision referred to is § 25 of the Act of March 4, 1909, c. Stat. 1075, 1081, as amended by the Act of August 24, 1912, 488, 489, which provides:

elief for the infringement was sought in the seventh count of the rred to in No. 139, decided this day. The question here discussed d by a cross-appeal. The several questions presented by Nos. 138, 140 were embraced in a single certificate, but separate briefs were

"That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but [here follow limitations applicable specifically to newspaper reproductions of photographs, and certain motion picture infringements of undramatized or nondramatic work and of copyrighted dramatic or dramatico-musical work], and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served on him."

Then follows the so-called schedule of which the "Fourth" item is:

"In the case of dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

The Copyright Act confers two monopolies—that of making copies and that of giving public performances for profit. It was settled in *Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, which dealt with the infringement by a newspaper of the monopoly of copying, that for each publication $250 is the minimum damages. An unbroken line of decisions in the lower courts has since held that the rule declared in the *Westermann* case is applicable also to infringement of the monopoly of giving public performances. It is now contended that, as applied to performances, the rule is burdensome and unreasonable; that it was followed unwillingly[2] by the

[2]Defendant relies upon statements in several cases in which the courts have commented upon the ambiguity or severity of the Act. See Waterson, Berlin & Synder Co. *v.* Tollefson, 253 Fed. 859; M. Witmark & Sons *v.* Pastime Amusement Co., 298 Fed. 471, 481; Buck *v.* Jarvis, unreported, E. D. Va., decided March 23, 1927; Dreamland Ball Room, Inc. *v.* Shapiro, Bernstein & Co., 36 F. (2d) 354, 355. Compare Irving Berlin, Inc. *v.* Daigle, 31 F.

lower courts in the mistaken belief that the *Westermann* case required them to do so; that the legislative history of § 25, when considered in the light of earlier copyright acts, indicates that the fourth subdivision, relating to musical compositions, was not intended to be controlled by the maximum and minimum provisions of the so-called "no other case" clause; and that the decision in the *Westermann* case is not decisive of the question certified.

The argument is that § 25 was a codification of § 4965 and § 4966 of the Revised Statutes which embodied a distinction recognized in earlier Acts between the imposition of penalties for copying, and the awarding of damages for performing; that there is no language in § 25 indicating an intention to apply the maximum and minimum provisions, theretofore contained in the penal § 4965 which dealt with unauthorized copying, to cases falling within the former remedial § 4966 which gave damages for unauthorized performing; and that a contrary intention appears from the House Report of the 1909 Act.[3] This argument overlooks the fact that the primary purpose of § 25 was to incorporate in one section all of the civil remedies theretofore given, including statutory damages where actual proof was lacking. It is true that the second subdivision, involved in the *Westermann* case, had been part of the old penal § 4965 of the Revised Statutes. But there is nothing to show an intention to exclude the infringements mentioned in the other subdivisions from the operation of the maximum and minimum clause. The history of the section, as revealed in the extended hearings which

(2d) 832, 835. But in all of these cases the Westermann decision was followed. Occasionally, where the statutory measure appeared burdensome under the circumstances, courts have reduced or refused to allow counsel fees. Fred Fisher, Inc. *v.* Dillingham, 298 Fed. 145, 152; Cravens *v.* Retail Credit Mens' Ass'n, 26 F. (2d) 833, 836. But see M. Witmark & Sons *v.* Calloway, 22 F. (2d) 412, 415.

[3] See H. Rep. No. 2222, 60th Cong., 2d Sess., February 22, 1909, p. 15. The statement relied upon is: "The provision that in lieu of actual damages and profit such damages shall be awarded as shall appear to the court just, not exceeding the sum of $5,000, is a modification of existing law, decreasing instead of increasing the amount which may be obtained in this way." Defendant contends that this sentence indicates an intention to continue the distinction between scheduled damages for unauthorized performances, and penalties for copying, the latter having been limited by the Act of March 2, 1895, c. 194, 28 Stat. 965, to $10,000. Compare *infra*, Note 4.

preceded the Act of 1909, makes the contrary clear.[4] We are of opinion that the maximum and minimum provisions were intended to be applicable alike to all types of infringement except those for which the section makes other specific provision.

It is urged, however, that under such interpretation the suggested measure of ten dollars a performance, scheduled in the fourth subdivision of § 25, would not be applicable unless more than twenty-five infringing performances were proved. This appears to be the meaning of the section, read as a whole, particularly since the amounts in the scheduled subdivisions appear to have been inserted merely as an aid to the court in awarding such damages as "shall appear to be just."[5] The definite specification of a maximum and minimum in every case, is not contradicted in any way by these

[4]The suggested consolidation of Rev. Stat. § 4965 and § 4966 was repeatedly attacked throughout the hearings which lasted three years. See Arguments before the Committee on Patents, on S. 6330 and H. R. 19853, 59th Cong., 1st Sess., June 6-9, 1906, pp. 124, 137, 177; *id.*, December 7-11, 1906, pp. 36, 144, 176; compare *id.*, March 26-28, 1908, pp. 21, 362. This section was, however, retained in the bill. See H. Rep. No. 2222, *supra* Note 3, pp. 15-16; Sen. Rep. No. 1108, 60th Cong., 2d Sess., p. 15. In commenting on the bill, which was the result of a series of conferences called by the Librarian of Congress, the latter said, concerning the remedies for infringements: "One inconvenience is that they [the existing statutes] provide a different class of remedies and recoveries for different subject-matter; another is that they confuse the duty of the Government to punish a deliberate infringement . . . with the right of the copyright proprietor for compensation for his particular loss. The bill attempts to provide uniform remedies, and it divorces the civil action from the criminal." Arguments before the Committees on Patents, *supra*, June 6-9, 1906, p. 13. Compare Ann. Rep. of Register of Copyrights (1929), pp. 12-14. The provision to which reference was made was Rev. Stat. § 4965, as amended by the Act of March 2, 1895, c. 194, 28 Stat. 965, which provided that one-half of all penalties collected should accrue to the United States. This section was repealed by § 63 (35 Stat. 1088) of the 1909 Act.

[5]As originally proposed in June, 1906, the present Act provided for a maximum and minimum applicable to all types of infringement, and, in the then appended schedule, for an additional minimum in the case of "a dramatic or musical composition, [of] not less than one hundred dollars for the first and fifty dollars for every subsequent infringing performance." Thus where more than four infringing performances were proved, this original schedule may have imposed a higher minimum in such cases than the main clause. See Section 23, S. 6330, 59th Cong., 1st Sess., in Arguments before the Committees on Patents, *supra* Note 4, p. ix. As finally enacted, it furnished merely a guide for the court's discretion.

legislative suggestions as to what may be deemed reasonable allowances in cases falling within the prescribed limitations. See *Westermann* v. *Dispatch Printing Co.*, 249 U. S. 100, 106, 109. If as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress.* Question II is answered in the affirmative.

Question III. "Is § 25 (b) Fourth of the Copyright Act (17 U. S. C. sec. 25), applicable in the discretion of the Court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?"

This question has in part been necessarily answered by our discussion of Question II, for unless the number of infringing performances of a copyrighted musical composition exceeds twenty-five, the minimum allowance of $250 must be made. Where more than twenty-five infringing performances are proved, and there is no showing as to actual loss, the court must allow the statutory minimum, and may, in its sound discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages. See *Westermann* v. *Dispatch Printing Company*, 249 U. S. 100, 106. Subject to this limitation, Question III is answered in the affirmative.

Question IV. "In Section 25 (b) of the Copyright Act (17 U. S. C. Sec. 25) is the clause reading, 'nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant,' confined in its scope to the particular cases of infringement theretofore specifically mentioned in said Section 25 (b)?"

Inasmuch as the plaintiffs did not ask for more than the minimum statutory damages of $250, and did not appeal from the decree awarding only this sum, the question whether the court might have awarded more than the maximum of $5,000 is not properly raised upon the facts presented in this certificate. We have no occasion

*The Westermann case was decided in 1919. Since that time there have been repeated proposals to amend and/or completely revise the Copyright Act. See Ann. Rep. Register of Copyrights (1928), pp. 6-11; *id.* (1929), pp. 16-24; *id.* (1930), pp. 8-13. No suggested elimination of the minimum provision has been found. Compare H. R. 11852, 71st Cong., 2d Sess., § 10; H. R. 12549, § 14 (c) and (d), in H. Rep. No. 1732, 71st Cong., 2d Sess., pp. 8-9; Sen. Rep. 1732, *id.*, on H. R. 12549, § 14 (c) and (e) as amended.

to consider it. *Dillon* v. *Strathearn S. S. Co.*, 248 U. S. 182, 184; *Reincke* v. *Gardner*, 277 U. S. 239, 245; *White* v. *Johnson*, 282 U. S. 367, 371.

As to Question IV, the certificate is dismissed.

Question II, Yes.
Question III, Yes.
Question IV, not answered.

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